1992

Doreen Johnson v. Reynold Q. Johnson, Jr., Reynold Q. Johnson, Sr., and Mildred Johnson : Brief of Appellee

Utah Court of Appeals

Steven H. Lybbert; Attorney for Appellees.
Andrew B. Berry, Jr.; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

DOREEN JOHNSON, Plaintiff and Appellant, vs. REYNOLD Q. JOHNSON, JR., REYNOLD Q. JOHNSON, SR., and MILDRED JOHNSON, Defendants and Appellees,	Case No. 920773-CA Priority No. 16

APPELLEES' BRIEF

Appeal from a Summary Judgment of the
Sixth Judicial District Court, Sanpete County
The Honorable David L. Mower

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LIST OF PARTIES

The names of all parties to this action appear in the caption on the cover of this Appellees' Brief. Defendant Reynold Q. Johnson Jr. was never served and has never appeared in this action. Consequently, appellees are Reynold Q. Johnson Sr. and Mildred Johnson only.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Statutes and Court Rules

STATEMENT OF JURISDICTION

Plaintiff Doreen Johnson's appeal is from a final judgment of the Sixth Judicial District Court, Sanpete County. Doreen Johnson filed her appeal in this court. On its own motion this court transferred the appeal to the Utah Supreme Court pursuant to Rule 44, Utah Rules of Appellate Procedure.

The Supreme Court assigned the case back to this court pursuant to its statutory pour-over authority, Utah Code Ann. § 78-2-2(4).

This court has jurisdiction over cases assigned to it by the Utah Supreme Court pursuant to Utah Code Ann. § 78-2a-3(2)(k).

ISSUES PRESENTED FOR REVIEW

The sole issue is whether a triable issue of material fact exists which precluded the trial court from entering summary judgment for appellees on the ground that appellant's claims against appellees were barred by either the statute of limitations for actions for fraud, Utah Code Ann. § 78-12-26(3), or the statute of limitations for actions to set aside a fraudulent conveyance, Utah Code Ann. § 25-6-10, or the statute of frauds relating to interests in real property, Utah Code Ann. § 25-5-1.

Upon review of the grant of a summary judgment, this court will look at the facts and inferences to be drawn therefrom in the light most favorable to the losing party. Webster v. Sill, 675 P.2d 1170, 1172 (Utah 1983). Since, by definition, summary judgment does not resolve factual issues, when a party challenges a summary judgment, this court reviews the trial court's legal conclusions supporting the grant of summary judgment for correctness, according them no particular deference. Allen v. Ortez, 802 P.2d 1307, 1309 (Utah 1990).

However, since this court's review of a summary judgment is essentially "de novo" (except that this court is limited to a review of the record established in the trial court), when more than one ground is advanced in support of summary judgment, as was the case in this action, this court should review each advanced ground and apply the well-established rule that a judgment may be affirmed on any proper ground, even if the proper ground was not the one relied upon by the trial court. Bill Nay

& Sons Excavating v. Neeley Const. Co., 677 P.2d 1120 (Utah 1984). Likewise, if a grant of summary judgment was proper, but the trial court applied an erroneous standard in ruling on the summary judgment motion, this court may affirm the trial court's decision. City Elec. v. Industrial Indem. Co., 683 P.2d 1053 (Utah 1984). To hold otherwise would result in the needless remand of cases in which summary judgment was proper on the record before the trial court and the Court of Appeals. If this court were to identify a ground upon which the trial court should have granted summary judgment but did not because the trial court either relied on an improper ground or applied an erroneous standard in ruling on the summary judgment motion, and the case was remanded to the trial court, the moving party would merely move again for summary judgment and the now-enlightened trial court judge would again grant summary judgment on the proper ground or after applying the correct standard. Such a procedure would constitute a waste of judicial resources.

In short, when an appellee advanced a sufficient ground for a summary judgment in the trial court, this court should be no more reluctant to affirm that summary judgment even if the trial court based its ruling on an insufficient ground or on an erroneous standard, than this court would be to find that a trial court erroneously denied a meritorious motion for summary judgment.

RULES AND STATUTES TO BE INTERPRETED

Appellees submit that appellant's claims against them were barred by either the statute of limitations relating to causes of action for fraud, Utah Code Ann. § 78-12-26(3), the statute of limitations relating to causes of action to set aside a fraudulent conveyance, Utah Code Ann. § 25-6-10, or the statute of frauds relating to interests in real property, Utah Code Ann. § 25-5-1. Those statutes are quoted verbatim:

Utah Code Ann. § 25-5-1. Estate or interest in real property.

> No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

Utah Code Ann. § 25-6-10. Claim for relief - Time limits.

> A claim for relief or cause of action regarding a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:
>
> (1) under Subsection 25-6-5(1)(a), within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;
>
> (2) under Subsection 25-6-5(1)(b) or 25-6-6(1), within four years after the transfer was made or the obligation was incurred; or
>
> (3) under Subsection 25-6-6(2), within one year after the transfer was made or the obligation was incurred.

Utah Code Ann. § 78-12-1. Time for commencement of actions generally.

> Civil actions may be commenced only within the periods prescribed in this chapter, after the cause of action has

accrued, except in specific cases where a different limitation is prescribed by statute.

Utah Code Ann. § 78-12-26(3). Within three years.

Within three years:

. . .

(3) An action for relief on the ground of fraud or mistake; except that the cause of action does not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

Because this appeal requires determining whether a summary judgment was properly granted, a copy of Rule 56, Utah Rules of Civil Procedure, is included in its entirety in the addendum to this Appellees' Brief.

STATEMENT OF THE CASE

Nature of the Case

On April 15, 1991 appellees Reynold Q. Johnson, Sr. and Mildred Johnson filed an action in unlawful detainer in the Sixth Circuit Court, Sanpete County, against appellant Doreen Johnson, alleging that she was a tenant at will of the property at 390 North Main in Manti, Utah and was in unlawful detainer of that property. The case number was 91-CV-1581.

On August 15, 1991 appellant filed this action to quiet title to the same property, alleging that her former husband, Reynold Q. Johnson, Jr., had defrauded her out of any interest in the property during the course of their divorce action in 1985. Appellant added causes of action against her former husband to modify the divorce decree. However, Reynold Q. Johnson, Jr. was never served in this action and has not appeared.

The appellees' circuit court unlawful detainer action was consolidated with this action (R. 57), and effectively subsumed into this action, since the issue--ownership of the property--was the same in both cases.

Course of Proceedings

Doreen Johnson filed her action, entitled Verified Petition for Modification of Decree of Divorce, on August 15, 1991 (R. 59-65). She filed an amended petition on September 3, 1991 (R. 66-74), and appellees filed their answer to the amended petition on October 8, 1991 (R. 76-79).

After taking appellant's deposition, appellees moved for summary judgment on March 26, 1992 (R. 111). In support of the

summary judgment motion, appellees submitted a memorandum (beginning at R. 114) accompanied by pages 3 through 25 of the transcript of appellant's deposition testimony (beginning at R. 123), the affidavit of Reynold Q. Johnson Jr. (R. 12-15), the affidavit of Reynold Q. Johnson, Sr. (R. 23-25), and exhibits attached to those affidavits.

Doreen Johnson did not file a memorandum in opposition to the summary judgment motion, but she did file her affidavit in opposition to the summary judgment motion on April 15, 1992 (R. 150). A copy of the affidavit was not served on appellees' attorney at that time. Instead, it was hand delivered to him on April 29, 1992. After twice being set for hearing and continued, the motion was finally heard on May 20, 1992.

Hearing on the motion took place, arguments were presented, appellees' attorney orally objected to much of appellants affidavit (R.T. 20:24-24:11) on the grounds that much of the factual assertions contained therein were either hearsay or statements of "ultimate fact" for which no subsidiary facts were stated to provide a foundation for the "ultimate facts" alleged, and the court took the motion under advisement.

On June 12, 1992 the trial court issued its minute order (R. 210-214), granting the motion for summary judgment. The court entered its Order Granting Motion for Summary Judgment, Summary Judgment, and Order of Restitution (R. 215-217) on July 8, 1992. Doreen Johnson filed a Notice of Appeal (R. 225) from the summary judgment.

RELEVANT FACTS

The affidavits, exhibits thereto, and deposition testimony presented in support of appellees' summary judgment motion established the following facts which appellees contend are undisputed:

1. On June 29, 1984 Reynold Q. Johnson Jr. received a warranty deed from Sterling Potter and Mariella Potter, as trustees of the Sterling Potter Family Trust to the property at 390 North Main, Manti, Utah. The warranty deed was recorded in the office of the Sanpete County Recorder on July 2, 1984. (Affidavit of Reynold Q. Johnson Jr. and deed attached as an exhibit thereto, R. 12-15).

2. At the time Reynold Q. Johnson Jr. acquired that property, he and appellant were married but separated. (R. 13).

3. On July 13, 1984 Reynold Q. Johnson Jr. quit-claimed the same property to his parents, the appellees herein, as joint tenants. (Exhibit to affidavit of Reynold Q. Johnson Sr., R. 25).

4. Reynold Q. Johnson Jr. filed for divorce from appellant in August 1984, after he had quit-claimed the Manti property to appellees. (R. 13).

5. The quit-claim deed from Reynold Q. Johnson Jr. to appellees was recorded on November 2, 1984 in the office of the Sanpete County Recorder. (R. 13, 23, 25).

6. Appellant moved into the house on the property on June 23, 1985. (Deposition of Doreen Johnson, 4:6-8; R. 124). Even before moving into the house, appellant had been at the property

while her Reynold Q. Johnson Jr. was "fixing it up." (Deposition of Doreen Johnson, 10:18-25; R. 130).

7. Reynold Q. Johnson Jr. became divorced from appellant on July 19, 1985. (R. 13).

8. Appellant has continuously lived in the house on the subject property since June 23, 1985, except for several months between the end of 1985 and May or June of 1986 when she lived in and managed an apartment house in Ogden at her ex-husband's request. (Doreen Johnson deposition, 4:12-24; R. 124).

9. Appellant knew that her divorce was not final when she moved into the hosue on the subject property. (Doreen Johnson deposition, 11:8-13; R. 131).

10. On April 12, 1985 appellant signed a stipulation in her divorce action by which she agreed to accept an office building in Mount Pleasant. By its terms the stipulation awards her no interest in any other real property. (Exhibit 1 to Doreen Johnson deposition). Appellant read "some" of the stipulation before signing it. (Doreen Johnson deposition, 15:12-13; R. 135). Appellant received a photocopy of the signed stipulation in the mail in "July or so" of 1985 when Reynold Q. Johnson III was still an infant. (Doreen Johnson deposition, 16:11-17:7; R. 136-137). Reynold Q. Johnson III was born three days before appellant moved into the house on the subject property on June 23, 1985. (Doreen Johnson deposition, 4:6-10; R. 124).

11. Appellant read the stipulation after receiving the photocopy in the mail. (Doreen Johnson deposition, 17:20-22; R. 137).

12. Appellant was represented by attorney Paul Frischknecht during the divorce action. (Doreen Johnson deposition, 12:14-15; R. 132).

13. From the time she moved into the house on the subject property on June 23, 1985 until being served with the unlawful detainer action brought in the Circuit Court by appellees, appellant never discussed the ownership of the property with her former husband. (Doreen Johnson deposition, 22:4-16; R. 142).

14. When she first moved into the home on the property, appellant gave Reynold Q. Johnson Jr. money to stay in the home. (Doreen Johnson deposition, 23:12-25:23; R. 143-145). Reynold Q. Johnson Jr. told appellant that his dad (appellee Reynold Q. Johnson Sr.) owned the house and wanted $240 per month for rent. (Doreen Johnson deposition, 25:5-11; R. 145).

15. Appellant does not claim to have a deed that gives her title to the property. (Doreen Johnson deposition, 21:4-6; R. 141).

SUMMARY OF ARGUMENT

As it relates to appellees, appellant Doreen Johnson's Amended Verified Petition for Modification of Decree of Divorce claims generally that she is the "equitable owner" of the property at 390 North Main Street, Manti, Utah because her ex-husband, Reynold Q. Johnson Jr., defrauded her out of an interest in the property during the divorce action between her and Johnson Jr. by not telling her about his interest in that property during the divorce action, and that appellees colluded and conspired to deprive her of an interest in the property, apparantly by

accepting title to the property from their son. She asked that she be awarded "all right, title and interest" to the property. (R. 66-74).

Because she waited more than six years after she was first aware that either her ex-husband or his parents claimed to own the property, and because the deed by which her ex-husband acquired title to the property and the deed by which he granted the property to appellees were both recorded, any claim she might have to the property is barred by the three-year limitation period for bringing an action for relief on the ground of fraud, Utah Code Ann. § 78-12-26(3), or by the four-year limitation period for bringing an action to set aside a fraudulent conveyance. Utah Code Ann. § 25-6-10(1).

Appellant's claim of equitable ownership is also barred by the statute of frauds relating to interests in real property, Utah Code Ann. § 25-5-1.

Appellant's affidavit in opposition to appellee's summary judgment motion did not contain admissible facts sufficient to create a triable issue of material fact. Her argument that her cause of action did not accrue until within three years of bringing her action by reason of her failure to discover facts constituting fraud is without merit. As a matter of law appellant had knowledge of all the facts she needed to discover the existence of any fraud, had she been diligent in making use of those facts. Further, appellant's affidavit consisted, in large part, of inadmissible evidence to which appellees interposed adequate and appropriate objections.

Appellant's claim that she should be awarded attorney fees on appeal because appellees' summary judgment motion and their defense of this appeal are frivolous is unsupported by citation to any authority. Appellant's attorney fee argument is itself without merit and frivolous.

ARGUMENT

A.
THE TRIAL COURT CORRECTLY RULED THAT APPELLANT'S FRAUD CLAIM WAS BARRED BY UTAH CODE ANN. § 78-12-26(3)

In support of their summary judgment motion, appellees presented evidence of the following facts:[1]

On June 29, 1984 Reynold Q. Johnson Jr. obtained title to residential property in Manti, Utah. Two weeks later, on July 13, 1984, Johnson Jr. quit-claimed the property to his parents, appellees herein. The quit-claim deed was recorded on November 2, 1984.

In August, 1984 Johnson Jr. commenced a divorce act6ion against his wife, appellant herein. On June 23, 1985, more than seven months after parting with title to the Manti property, Johnson Jr. moved appellant into the home on the property. At that time the divorce was not yet final. Johnson Jr. told appellant that the property belonged to his parents and she needed to pay $240 per month to stay in the house.

1. Appellant submitted an affidavit in opposition to the summary judgment motion but none of the facts set forth in appellees' motion were contravened by the affidavit.

Except for a period of months from near the end of 1985 until May or June of 1986 when Johnson Jr. moved appellant to an apartment house in Ogden which she managed, appellant has lived in the home in Manti.

On April 16, 1991, almost six years after she first moved into the house, appellant was served by appellees with an action in unlawful detainer. (R. 1 [Complaint], 3-4 [Summons and Return of Service]). Only thereafter, on August 15, 1991, more than six years after she first moved into the house (and more than five years after moving back into the house) did appellant file the instant action (R. 59) alleging that she was defrauded of an interest in the house by Johnson Jr. and that she was the "equitable" owner of the house and property.

The trial court correctly granted appellee's summary judgment motion on the ground that appellant's equitable ownership claim was barred by the statute of limitations for actions for fraud, Utah Code Ann. § 78-12-26(3).

Even assuming that appellant's ex-husband, Johnson Jr., defrauded her out of an interest in the subject property by not disclosing his purchase of the property during the marriage or by quit-claiming title to the property to his parents before filing for divorce, any claim to establish an ownership interest in the property by reason of such fraud was barred by the three-year limitation period specified in section 78-12-26(3).

Section 78-12-26(3) provides that an action for relief on the ground of fraud must be brought within three years; except that the cause of action in such case does not accrue until the

discovery by the aggrieved party of the facts constituting fraud. The "discovery" rule does not aid appellant in this case. The possession of all information necessary to discover fraud satisfies the requirement that the plaintiff be aware of the fraud. Horn v. Daniel, 315 F.2d 471 (10th Cir. 1962). That is, the three years to bring an action for fraud begins from when the facts constituting the fraud are or should have been discovered. Richardson v. MacArthur, 451 F.2d 35 (10th Cir. 1971). In discussing a plaintiff's fraud claim in Gibson v. Jensen, 48 Utah 244, 158 P. 426 (1916), the Supreme Court stated:

> It was not necessary for her to be informed of all the details. [Citation]. If she was made aware of the principal or controlling facts, it was sufficient. By that we mean it was sufficient if she was fully informed of such facts as would put a person of ordinary intelligence and prudence upon inquiry. If she was so informed, then she had all the information contemplated by the statute [of limitations for actions for fraud]. 158 P. at 427.

Plaintiff's deposition testimony makes it abundantly clear that she has been living in the home on the subject property since June 23, 1985 knowing that she had no legal interest in the property. She acknowledges that she moved into the home on the property before her divorce from Johnson Jr. was final. She admits that even before she moved into the home, she had been at the property when her ex-husband was "fixing it up." She admits that she received and read a copy of the stipulation she signed in the divorce action in July or August 1985. That stipulation clearly provides that the only real property she was to be awarded was an office building in Mount Pleasant.

Perhaps most significantly, appellant admits that after she moved into the home, her ex-husband came to the property on more than one occasion, told her that his father owned the property, and demanded rent. Certainly, within at most a few months after moving into the house on the subject property, appellant was fully aware that she had been awarded no legal ownership interest in the property in the divorce action, that her ex-husband was exercising control over the conditions upon which she could live there, and that her ex-husband claimed (correctly) that the property was owned by appellees. She had all the information she needed to conclude that she may have been defrauded out of an interest in the property.

B.

APPELLANT'S CLAIM TO OWNERSHIP OF THE SUBJECT PROPERTY IS ALSO TIME-BARRED BY UTAH CODE ANN. § 25-6-10

If the fraud of which appellant complains is the transfer of the property from Reynold Q. Johnson Jr. to appellees, then her action is barred by Utah Code Ann. § 25-6-10.[2] Section 25-6-5(1)(a) provides as follows:

> (1) A transfer made . . . by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> > (a) with actual intent to hinder, delay, or defraud any creditor of the debtor; . . .

2. In granting appellees' summary judgment motion, the trial court relied solely on section 78-12-26(3). If this court were to conclude that appellant's action against appellees is not barred to section 78-12-26(3), but is barred by section 25-6-10, the trial court's judgment should still be affirmed. Bill Nay & Sons Excavating v. Neeley Const. Co., 677 P.2d 1120 (Utah 1984).

Assuming Reynold Q. Johnson Jr. transferred the subject property to appellees to avoid its inclusion in the marital estate, because he knew he was on the verge of filing for divorce, then arguably the transfer was fraudulent, as defined by section 25-6-5(1)(a). Section 25-6-10(1) provides as follows:

> A claim for relief or cause of action regarding a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:
>
> (1) under Subsection 25-6-5(1)(a), within four years after the transfer was made . . . or, if later, within one year after the transfer . . . was or could reasonably have been discovered by the claimant.

Appellant had constructive notice of the transfer of the Manti property since November 2, 1984 when the quit-claim deed from Johnson Jr. to appellees was recorded. Utah Code Ann. § 57-3-2(1) [a properly recorded document imparts notice to all persons of its contents]; Smith v. Edwards, 81 Utah 244, 17 P.2d 264, 269 (1932) ["If one is charged with notice of the contents, he must be charged with notice of the existence of the document itself"].

It is clear that the status of legal ownership of the property "could reasonably have been discovered" by appellant. If she had, at any time after November 2, 1984, developed even an inkling of curiosity over the state of legal title she could have checked the county recorder's records and found, not only that appellees were legal owners, but also that they received their title by quit-claim deed from her ex-husband. Instead, appellant was content to live in the home knowing she did not have title to it and that it had not been awarded to either party in her

divorce proceeding, as long as no one challenged her right to stay.

The present case is somewhat analogous to the facts of Horn v. Daniel, supra, 315 F.2d 471. In that case Horn commenced an action to set aside a deed to mining claims delivered by him to Daniel. He alleged that he was fraudulently induced to deliver the deed. Daniel knew that Newmont Exploration wished to lease and work a group of mining claims, some of which were held by Horn and some by Daniel. Daniel convinced Horn to give him a deed to Horn's claims for a small considertion. Horn conveyed his claims to Daniel on May 20, 1957. Daniel then entered into a favorable lease of the claims with Newmont. It wasn't until October 17, 1960 that Horn filed suit to set aside the deed to Daniel. On appeal from a determination by the District Court that Horn's claim was barred by the three-year limitation period of section 78-12-26(3), the 10th Circuit reviewed the facts which Horn was aware of more than three years before filing his action. The court noted that: "On October 11 [1957] the Newmont lease was recorded and its terms were public." Though not stated explicitly, it appears that the 10th Circuit concluded that--at the latest--once the lease between Daniel and Newmont was recorded, the three year period to bring suit for fraud began to run. The court held that, "[t]he possession of all information necessary to discover fraud satisfies the requirements of the Utah statute." 315 F.2d at 474.

C.

APPELLANT'S CLAIM OF EQUITABLE OWNERSHIP OF THE SUBJECT PROPERTY IS BARRED BY THE STATUTE OF FRAUDS

Appellant's claim of equitable ownership of the subject property flies in the face of the statute of frauds, Utah Code Ann. § 25-5-1. Section 25-5-1 states: "No estate or interest in real property, other than leases for a term not exceeding one year . . . shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing."

Appellant has never contended that she has a deed purporting to give her any interest in the Manti property. Because she did not file a memorandum in opposition to appellees' summary judgment motion, appellees can only guess as to why she thinks the alleged fraud on the part of appellees' grantor exempts her from the requirements of section 25-5-1.

Application of section 25-5-1 (or either of the statutes of limitation discussed above) would not leave appellant without a remedy. She is still free to pursue an action for money damages against Reynold Q. Johnson Jr., if she really believes there were assets other than the Manti property which were hidden away by him at the time of the divorce. Application of section 25-5-1 to appellant's claim of "equitable ownership" of the property would merely preclude her from looking to the property that has been owned by appellees for more than eight years to satisfy any recovery she might obtain against Johnson Jr.

D.
THE AFFIDAVIT FILED BY APPELLANT IN OPPOSITION TO APPELLEES' SUMMARY JUDGMENT MOTION WAS INSUFFICIENT TO RAISE A TRIABLE ISSUE OF MATERIAL FACT

In opposition to the summary judgment motion, appellant filed an affidavit. (R. 150). That affidavit did not dispute any of the "undisputed facts" set forth in appellees' memorandum in support of their summary judgment motion.[3] It did contain numerous assertions of fact relating to her claim that Johnson Jr. secreted other assets at the time of the divorce. At hearing on the summary judgment motion, appellees objected to many of the paragraphs of the affidavit on various grounds. Most of the affidavit's assertions were of "ultimate" fact without setting forth foundational subsidiary facts, or were hearsay, or were in violation of the best evidence rule. (R.T. 20:24-24:11). The trial court did not rule on the objections but, in determining whether a triable issue of material fact existed, was entitled to ignore inadmissible evidence presented in the affidavit to which objections were made. Treloggan v. Treloggan, 699 P.2d 747 (Utah 1985); Norton v. Blackham, 669 P.2d 857 (Utah 1983) [statements in an affidavit that are largely conclusory, and would not be admissible in evidence, may not be considered on motion for summary judgment]; Walker v. Rocky Mt. Recreation Corp., 29 Utah

3. Appellant did not file a memorandum in opposition to the motion so, obviously, she did not comply with Rule 4-501(2)(b) which requires a memorandum in opposition to a motion for summary judgment to begin with a section that contains a concise statement of material facts as to which she contends a genuine issue exists.

2d 274, 508 P.2d 538 (1973) [hearsay testimony that would not be admissible at trial is insufficient to create a triable issue of fact upon motion for summary judgment].

Appellees specifically objected to paragraphs 5, 8, 9, 13 and 14 of appellant's affidavit. The objection to paragraph 5, which claimed that Johnson Jr. "falsely represented to [appellant] during the divorce that the only assets of the marriage was a building . . . in the city of Mount Pleasant" was based on a lack of foundation. The objection to paragraph 8 was based on the hearsay nature of the assertions therein: Appellant asserted what her attorney told her that attorney Steven Henroid told him (based on what Johnson Jr.'s sister told Henroid at a deposition). The objections to paragraphs 13 and 14 were also made on the basis of a lack of foundation for the assertions made therein, because the assertions were of "ultimate facts" only.[4]

Those paragraphs of appellant's affidavit to which appellees did not object were irrelevant to a determination of whether appellant's cause of action for fraud relating to the Manti property arose within three years of filing her action. They relate to her claims that other assets existed at the time of the marriage about which she had no knowledge until so informed by

4. For example, paragraph 14 of appellant's affidavit states: "Reynold Q. Johnson, Jr., lien to me about the true ownership of the residence at 390 North Main Street [in Manti]. He told me his parents owned the residence and real property when in fact he and I owned it." The assertion that appellant "owned" the subject property was clearly an ultimate fact not supported in that paragrah or elsewhere in the affidavit by any subsidiary facts that would substantiate appellant's ownership claim.

her attorney. For example, paragraph 10 of appellant's affidavit merely speaks in terms of "several parcels of real property which existed . . . at the time of the entry of the Decree of Divorce." Paragraph 11 discusses an account at Merrill Lynch, the funds in which may have belonged to Reynold Q. Johnson Jr. The existence of such an account is irrelevant to the question whether appellant was defrauded of an interest in the Manti property or, if she was, whether she knew or should have known of that fraud more than three years before bringing her action. Paragraph 12 talks in terms of "residences and real properties" transfered by Johnson Jr. to members of his family but, again, whether appellant has a claim against her ex-husband relating to other assets is irrelevant to the question whether she has a claim against appellees relating to the Manti property.

Appellant's affidavit totally failed to set forth facts to rebut the obvious and undisputed facts that she had lived in the Manti property transferred by Johnson Jr. to appellees for more than six years, knowing that she had no legal title, knowing that Johnson Jr. had moved her into the home on the property after fixing it up himself, and knowing that he claimed that his parents owned the property. The affidavit may have been sufficient to create a triable issue about her discovery of the existence of other allegedly secreted assets, if those other assets were at issue in this case, but was totally insufficient to create a triable issue as to the applicability of sections 78-12-26(3) and 25-6-10(3) as they relate to appellant's claim that she was defrauded out of an interest in the Manti property.

E.
APPELLANT'S ARGUMENT THAT APPELLEES' "MOTION FOR SUMMARY JUDGMENT AND THE DEFENSE OF THE APPEAL IS WITHOUT MERIT AND IS FRIVOLOUS" IS ITSELF FRIVOLOUS: APPELLEE SHOULD BE AWARDED THE FEES THEY INCUR IN RESPONDING TO THE ARGUMENT

Appellant's argument, beginning at page 24 of her brief, that appellees' summary judgment motion and the defense of her appeal were/are without merit and frivolous is itself a frivolous argument.

The trial court obviously did not think the summary judgment motion was frivolous or without merit, since it granted the motion. If appellant thought the motion was frivolous he should have made that argument to the trial court--not this court.

Appellant has not cited a single case, nor have appellees found one, that has ever held that the defense in an appellate court of a trial court's judgment can or has been frivolous.[5] Rule 33, Utah Rules of Appellate Procedure, upon which appellant relies, by its very terms only addresses situations in which an appeal is taken which is frivolous or interposed for an improper purpose. It strikes appellees as especially frivolous for appellant to make an argument that defense of the trial court's judgment is frivolous and without merit at a time when appellees had not yet even filed their brief.

Appellees respectfully submit that if there should be a Rule 33 award of costs or attorney fees in this case, the award should

5. Counsel for appellees searched unsuccessfully for such a case decided under either Rule 33, Utah Rules of Appellate Procedure or Rule 38, Federal Rules of Appellate Procedure.

be in favor of appellees to compensate them for the three-quarters of an hour their attorney spent researching Rule 33, U.R.A.P., and Rule 38, F.R.A.P., and drafting this portion of Appellees' Brief.

CONCLUSION

The undisputed facts before the trial court demonstrated clearly that appellant's claims against appellees were brought beyond the time limits prescribed by Utah Code Ann. §§ 78-12-26 (3) and 25-6-10(1). Those undisputed facts also demonstrated that appellant had actual and constructive notice of facts which should have put her on notice of any fraud on the part of her ex-husband, Reynold Q. Johnson Jr., with regard to the conveyance by him to appellees of the property upon which she continues to reside.

In opposition to appellees' summary judgment motion, appellant offered only her affidavit containing almost exclusively hearsay, conclusory statements lacking foundation, and assertions concerning other assets that might have belonged to Johnson Jr. at the time of her divorce from him, but which were totally irrelevant to her claim of ownership of the subject property in Manti, Utah. The affidavit failed to state facts sufficient to create a triable issue of material fact as to whether her action claiming that she was fraudulently deprived of an interest in the Manti property was brought in a timely manner. As a matter of law it was not.

Based on all of the above, appellees' Reynold Q. Johnson Sr. and Mildred Johnson respectfully submit that the Order Granting

Motion for Summary Judgment, Summary Judgment, and Order of Restitution entered by the trial court should be affirmed. Appellees should also be awarded their costs incurred on appeal, together with attorney fees pursuant to Rule 33 incurred in responding to appellant's frivolous, meritless argument for costs and attorney fees.

Dated this 17th day of February, 1993.

Steven H. Lybbert
Attorney for Appellees

ADDENDUM

1. Pages 20 through 24, Transcript of Proceedings: Motion for Summary Judgment (R.T. 20-24)

2. Order on Motion for Summary Judgment (R. 210-214)

3. Order Granting Motion for Summary Judgment, Summary Judgment, and Order of Restitution (R. 215-217)

4. Rule 56, Utah Rules of Civil Procedure

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR THE COUNTY OF SANPETE, STATE OF UTAH

DOREEN JOHNSON, Plaintiff, VS. REYNOLD Q. JOHNSON, JR., REYNOLD Q. JOHNSON, SR., and MILDRED JOHNSON, Defendant.	CASE NO. 9952 MOTION FOR SUMMARY JUDGEMENT TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on the 20th day of May 1992, commencing at 10:00 a.m., that the above entitled matter came on regularly before the Honorable DAVID L. MOWER, Judge of the Sixth Judicial District Court in and for the County of Sanpete, State of Utah, at the Sanpete County Courthouse, Manti, Utah;

That on the 19th day of January, 1993, STEVEN H. LYBBERT, Counsel for defendants REYNOLD Q. JOHNSON and MILDRED JOHNSON in the above entitled action, requested a copy of the TRANSCRIPT OF PROCEEDINGS and that TRANSCRIPT OF PROCEEDINGS appears herein as follows:

J. M. LIDDELL, CSR, RPR
SIXTH JUDICIAL DISTRICT REPORTER
SANPETE COUNTY COURTHOUSE
MANTI, UTAH 84642

THE COURT: She should have checked it out.

MR. LYBBERT: She could have checked it out. She had the unhindered right to check it out. If she'd--if at any time during those years she'd said, "I wonder how this house is titled?" She could have gone. She could have seen that it's titled in the name of my clients and that deed would have shown that they received title from her ex-husband Reynold, Jr.

THE COURT: And the discovery requirement is not actual discovery. It's either that you knew or should have known.

MR. LYBBERT: That's correct.

THE COURT: And you're saying that there's a burden on her to investigate.

MR. LYBBERT: Yes. There is a burden on her to investigate. I mean that's part of the recording.

THE COURT: That's why they have recorder's offices. And if the statute of limitations has expired, then she can't make a claim and the title has to rest in the recorded owner, which is your clients.

MR. LYBBERT: Right. Now she's filed an affidavit--are we on record?

THE COURT: We are.

MR. LYBBERT: Okay. And I'd like to express for the record my objection to part of that affidavit.

THE COURT: Which one are you talking about?

MR. BERRY: Well, it's dated April 4th, or 7th, or 9st, something like that, of '92.

THE COURT: Okay. I have it right here.

[INDICATED]

MR. LYBBERT: Any other assets that--the money in the Merrill/Lynch account that Mr. Berry referred to and any other parcels of property that she didn't know about, that's all irrelevant and fine, if she just recently discovered that there were other property or there was money or something that she thinks should have been dealt with in that divorce that wasn't--she's still got her claim against her ex-husband among those. But as to this particular house, in view of the fact that she moved in knowing she didn't have title--she even testified in her deposition that one of the things she claims is that he--one of the things in this affidavit, it says, "He falsely represented to me that his parents owned the house." And in fact,--

THE COURT: That was true.

MR. LYBBERT: --that was true. And she testified that when she first moved in, her son would come around and said, "I need money for rent for my parents." And she would give him money for a couple of months and did that. And she stopped paying; he stopped coming around. So, you know, I think given all that, she certainly had enough information

that she should have been alerted that if she claimed an ownership interest, that she should have made it a long time ago.

She also testified in her deposition that she came around the house before the divorce was final while he was fixing it up, so right then and there maybe that should have alerted her that he might have an interest in it. And finally, she testified that she signed--the divorce was decided on the basis of a stipulation that she signed at a time when she was represented by Mr. Frischknecht. She testified that in July or so of 1985. This would be right around or within a month of the divorce being final.

THE COURT: What paragraph number are you looking at?

MR. LYBBERT: I'm looking at paragraph 10 of my statement of undisputed facts.

THE COURT: Oh, I was looking at the affidavit. I'm sorry.

MR. LYBBERT: Oh, no. Oh, no. I'm referring to her deposition.

THE COURT: Okay.

MR. LYBBERT: In July or so when Reynold Q. Johnson the third was still an infant, and he was born three days before she moved into that house, she received a photocopy of the signed stipulation in her divorce case and

she read it. So at that point in time, if not sooner, she knew that the divorce didn't give her any interest in that property. I think when you look at the totality of the circumstances, it's clear that if she had a claim for fraud against either her ex-husband or her ex-husband's parents, it should have been made years ago. The statute's just run. She's had the knowledge that she needed to know that she ought to delve into the matter further, at least.

THE COURT: Now you said there were parts of her affidavit that you thought were objectionable; why is that?

MR. LYBBERT: Well read, specifically, paragraph 5 of her affidavit. The second sentence if says: The defendant Reynold Q. Johnson, Jr., has falsely represented to me during the course of the proceeding that the only assets of the marriage was a building in Mt. Pleasant." I object to the term--well, first of all, I think the use of the term "falsely" is a conclusion of law, an ultimate fact, and there's no foundational facts to base the use of the word "falsely". There's no--there's pretty much complete lack of foundation as to that whole second sentence in paragraph 5.

THE COURT: Um-hm.

MR. LYBBERT: I think most of these statements in this affidavit lack foundation, and paragraph 8 is entirely hearsay.

I think paragraph 9, which seeks to interpret the deposition of Marilyn Rapley, should be stricken on the basis of Best Evidence Rule. I object to it on that ground.

THE COURT: Let me switch to Mr. Berry,--

MR. LYBBERT: Okay.

THE COURT: --and let me get a response from him.

MR. LYBBERT: I'd also, if I could be real brief, I'd also object to paragraphs 13 and 14 on the same basis, that they lack foundation and set forth either legal conclusions or ultimate statements of fact without any foundational back up.

THE COURT: Okay. Mr. Berry, what's the come back to the statute of limitations argument?

PLAINTIFF'S RESPONSE

BY MR. BERRY: Well, Your Honor, I think it's the law is clear that the statute begins to run when she learns of the fraud that was committed upon her. She didn't learn of the fraud until I was appointed by Judge Tibbs and investigated it and acquired the documents. It took me several months to do so. But I acquired the documents regarding the ownership of all the assets that existed during the marriage that were transferred just prior--or during the divorce proceeding, or just prior to the divorce proceeding. She didn't know of these facts until I told her of them and I showed her the documents that I actually

STATE OF UTAH)
) SS.
COUNTY OF SANPETE)

REPORTER'S CERTIFICATE

I, JOSEPH M. LIDDELL, CSR, RPR, Official Reporter for the Sixth Judicial District Court, County of Sanpete, State of Utah, hereby certify that I did transcribe the District Court tape record of proceedings held at the time, date, and place as set forth herein using computer aided transcription; that the foregoing pages, numbered 1 - 37, inclusive, constitute a true, correct and complete transcript of my notes as reduced to typewritten form by me or under my direction.

I further certify that I am not an agent, attorney or counsel for any of the parties hereto, nor am I interested in the outcome thereof.

IN WITNESS WHEREOF I have subscribed my name and affixed my seal this 3rd day of February 1992.

JOSEPH M. LIDDELL, CSR, RPR
Notary Public in and for the
State of Utah
[License No. 219-1801-1]

My Commission Expires:
5-6-94

--oOOo--

NOTARY PUBLIC
JOSEPH M. LIDDELL
307 West 100 South
Manti, Utah 84642
My Commission Expires
May 6, 1994
STATE OF UTAH

DISTRICT COURT, STATE OF UTAH
SANPETE COUNTY
Address: 160 North Main Street, Manti, UT 84642
Telephone: (801) 835-2131

Doreen Johnson,

Plaintiff,

vs.

Reynold Q. Johnson, Jr., Reynold Q. Johnson, Sr., and Mildred Johnson,

Defendant.

ORDER ON MOTION FOR SUMMARY JUDGMENT

Case number 9952

The parties: Reynold Q. Johnson and Mildred Johnson are married to each other. They are the parents of Reynold Q. Johnson, Jr., who, at one time, was married to Doreen Johnson. Reynold, Jr. and Doreen are the parents of six children.

The lawyers: Andrew B. Berry, Jr. represents Doreen. Steven H. Lybbert represents Reynold and Mildred, but not Reynold, Jr.

The facts: In 1984 Reynold, Jr. and Doreen were married but separated.

There is a residence located at 390 North Main Street in Manti, Utah.

The title to that home passed from a grantor to Reynold, Jr. by virtue of a deed dated June 29, 1984 and recorded July 2, 1984.

Reynold, Jr. conveyed his interest in the home to his parents in a deed dated July 13, 1984 and recorded November 21, 1984.

In the spring of 1985 Reynold, Jr. or Doreen filed a divorce action in the District Court of Salt Lake County.

Doreen and the children moved into the home in June of 1985.

The divorce decree was final in November of 1985. It is silent as to the home.

On April 15, 1991 Reynold and Mildred filed a lawsuit in the now-abolished Circuit Court asking for court assistance in evicting Doreen and for a judgment for unpaid rent and damages.

Doreen answered and said, in essence, that the home was a marital asset whose existence had been hidden from the divorce court by Reynold, Jr. and that she had filed an action to modify the divorce decree to rectify the problem and to claim her share of the asset.

It turned out that no such action had been filed. However, when that was pointed out to her lawyer, an action was filed in the District Court on August 15, 1991. It should be noted that the action included not only a petition to modify the divorce decree but also a quiet title claim against Reynold and Mildred. (Although Reynold, Jr. is named as a party, he has never been served. Consequently, the Court has no jurisdiction over him.)

Thereafter, the Circuit Court and the District Court cases were consolidated.

On March 26, 1992 Mr. Lybbert moved the Court for summary judgment against Doreen. He said that her claims were barred by the statute of frauds or by either of two statutes of limitation. The factual support for the motion was provided by affidavits and a deposition.

Mr. Lybbert's argument, in essence, is either that Doreen has no writing of any kind on which to base her claim to the land or that she knew or should have known that she was the victim of a fraud and waited too long to make any claim for relief.

The response to the motion from Doreen was her affidavit of April 4, 1992.

As expected in any lawsuit, the parties dispute about who said what or about the sequence and timing of events, etc. In this case, there are disputes about whether the home was acquired during the marriage, about whether Doreen knew or should have known about certain events, such as the recording of certain deeds, about who gave Doreen permission to move into the home, etc.

However, perhaps the most telling statement in any of the affidavits or depositions is one made by Doreen in the last paragraph of her affidavit of April 4, 1992:

> I and my childred have resided in the residence ...Since June, 1985, <u>believing we were renting</u> ... . (emphasis added)

If Doreen believed that she was a tenant, then she can have no ownership claim to the home. She cannot be allowed to pursue her assertion that she is the owner of any interest therein because a person cannot be an owner and a tenant at the same time.

Doreen's statement on April 4,1 1992 belies all her other pleadings in which she claims to be an owner or an equitable owner of the property. It also lends credence to the opposition's claim that she knew about the ownership status of the property in June of 1985 and took no action to claim anything to the contrary.

The Motion for Summary Judgment is granted because Doreen's claim is barred by the statute of limitations, Section 78-12-26(3). Mr. Lybbert is directed to prepare an appropriate order and to submit it for execution by following Rule 4-504, Rules of Judicial Administration.

Dated: 6/12/1992

David L. Mower

CERTIFICATE OF SERVICE

Copies of the above ORDER ON MOTION FOR SUMMARY JUDGMENT were distributed as follows (M = by mail, P = personal delivery, F = by Fax):

Date	To whom
6/15/1992	[M] Andrew B. Berry, Jr. P.O. Box 600 Moroni, UT 84646
6/15/1992	[M] Steven H. Lybbert 45 East Vine Street Murray, UT 84107

Marilyn Shepherd

STEVEN H. LYBBERT, Bar No. 4187
DAY & BARNEY
Attorneys for Defendants
Reynold Q. Johnson Sr.
and Mildred Johnson
45 East Vine Street
Murray, Utah 84107
Telephone: (801) 262-6800

IN THE SIXTH JUDICIAL DISTRICT COURT

SANPETE COUNTY, STATE OF UTAH

DOREEN JOHNSON, Plaintiff, vs. REYNOLD Q. JOHNSON, JR., REYNOLD Q. JOHNSON, SR., and MILDRED JOHNSON, Defendants.	ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, SUMMARY JUDGMENT, AND ORDER OF RESTITUTION Case No. 9952 Judge David L. Mower

The motion for summary judgment filed by defendants Reynold Q. Johnson, Sr. and Mildred Johnson came on regularly for hearing before The Honorable David L. Mower on May 20, 1992. Plaintiff appeared by her attorney, Andrew B. Berry, Jr. The moving defendants appeared by their attorney, Steven H. Lybbert. The court finds as a matter of law that plaintiff's claim against the moving defendants is barred by the statute of limitations, Utah Code Ann. Sec. 78-12-26(3). Good cause appearing,

IT IS ORDERED that the motion of defendants Reynold Q. Johnson, Sr. and Mildred Johnson for summary judgment is granted; and

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff's action be, and hereby is, dismissed as to defendant's Reynold Q. Johnson, Sr. and Mildred Johnson; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that title to the property at 390 North Main Street, Manti, Sanpete County, Utah which is more particularly described as follows:

> Beginning at the Northwest Corner of Lot 3, Block 97, Plat "A" Manti City Survey, Sanpete County, State of Utah; thence East 118.50 feet, thence South 107.25 feet, thence West 50.50 feet, thence North 37.00 feet, thence West 68.00 feet, thence North 70.25 feet to beginning, containing 0.23 of an acre, more or less.

is quieted in Reynold Q. Johnson, Sr. and Mildred Johnson; and

IT IS FURTHER ORDERED that possession of the premises at 390 North Main Street, Manti, Sanpete County, Utah be delivered to said defendants or their agent, and that the plaintiff and the plaintiff's property (and all persons claiming a right to occupancy of said property through plaintiff) be removed from the premises. The clerk of the court is directed to issue a Writ of Restitution and the Sheriff is directed to execute said Writ of Restitution immediately.

Dated this 8 day of ~~June~~ July, 1992.

/s/
David L. Mower
District Judge

CERTIFICATE OF MAILING

I certify that I am employed by the office of Day & Barney and that I mailed a true and correct copy of the foregoing, postage pre-paid, to the following:

Andrew B. Berry, Jr.
P.O. Box 600
Moroni, UT 84646-0600

on this 18th day of June, 1992.

Connie Casleon

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Compiler's Notes. — This rule is similar to Rule 56, F.R.C.P.

Cross-References. — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Affidavit.

—Contents.

Specific facts are required to show whether there is genuine issue for trial. Reagan Outdoor Adv., Inc. v. Lundgren, 692 P.2d 776 (Utah 1984).

When a motion for summary judgment is made under this rule, the affidavit of an adverse party must contain specific evidentiary facts showing that there is a genuine issue for trial. Treloggan v. Treloggan, 699 P.2d 747 (Utah 1985).

—Corporation.

Where an affidavit is made by an officer of a corporation, it is generally considered to be the affidavit of the corporation itself. However, the personal knowledge of an agent of the corporation who is not a corporate officer regarding the facts to which he has sworn will generally not be presumed, and therefore, the specific

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 17, 1993 two copies of the foregoing Appellees' Brief were mailed, by first class mail, postage prepaid, to:

Andrew B. Berry, Jr., Esq.
62 West Main Street
P.O. Box 600
Moroni, UT 84646-0600

Steven H. Lybbert
Attorney for Appellees